84-1069

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

May the Federal Communications Commission preempt the states' prescription of depreciation rates for intrastate ratemaking purposes in order to enhance the financial strength of telephone companies?

PARTIES

The parties to the proceeding before the U.S. Court of Appeals for the Fourth Circuit are listed below.

Petitioners and intervenors supporting petitioners were as follows:

The Virginia State Corporation Commission;
Florida Public Service Commission;
State of Michigan and Michigan Public Service Commission;
Department of Public Utility Control of the State of Connecticut;
People of the State of California and the Public Utilities Commission of the State of California;
National Association of Regulatory Utility Commissioners;
Public Service Commission of the District of Columbia;
Public Utilities Commission of Ohio;
Arkansas Public Service Commission;
Kansas State Corporation Commission;
Public Service Commission of Wyoming;
Washington Utilities and Transportation Commission;
Department of Public Service of the State of Minnesota;
Arizona Corporation Commission;
Citizens of the State of Florida;
National Association of State Utility Consumer Advocates;
Consumer Advocate of South Carolina;
Office of Consumers' Counsel for the State of Ohio;
Iowa State Commerce Commission;
Public Service Commission of Wisconsin;
Public Service Commission of West Virginia;
New York State Department of Public Service;
Board of Public Utilities of New Jersey; and
Louisiana Public Service Commission.

Respondents and intervenors supporting the respondents were as follows:

Federal Communications Commission;
United States of America;
North American Telephone Association;
American Telephone and Telegraph Company;
Southern Pacific Communications Company;
GTE Service Corporation;
Continental Telecom, Inc.;
United Telephone System, Inc.;
Cincinnati Bell, Inc.;
The Bell Telephone Company of Pennsylvania;
The Chesapeake and Potomac Telephone Company;
The Chesapeake and Potomac Telephone Company of Maryland;
The Chesapeake and Potomac Telephone Company of Virginia;
The Chesapeake and Potomac Telephone Company of West Virginia;
The Diamond State Telephone Company;
Illinois Bell Telephone Company;
Indiana Bell Telephone Company, Inc.;
Michigan Bell Telephone Company;
The Mountain States Telephone and Telegraph Company;
New England Telephone and Telegraph Company;
New Jersey Bell Telephone Company;
New York Telephone Company;
Northwestern Bell Telephone Company;
The Ohio Bell Telephone Company;
Pacific Northwest Bell Telephone Company;
The Pacific Telephone and Telegraph Company;
Bell Telephone Company of Nevada;
South Central Bell Telephone Company;
Southern Bell Telephone and Telegraph Company;
The Southern New England Telephone Company;
Southwestern Bell Telephone Company; and
Wisconsin Telephone Company.

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The Florida Public Service Commission petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 18, 1984. Rehearing was sought and was later denied on October 3, 1984. *Virginia State Corporation Commission v. Federal Communications Commission*, 737 F.2d 388 (4th Cir. 1984).

JURISDICTION

The decision of the Court of Appeals for the Fourth Circuit was entered on June 18, 1984. The Court denied rehearing on October 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is included in the appendices to the Petition for Writ of Certiorari filed by the People of the State of California, *et al.* (No. 84-889), and the Jurisdictional Statement of the Louisiana Public Service Commission (No. 84-871). The Federal Communications Commission's April 27, 1982 Order which found that the FCC would not preempt state prescription of depreciation rates and its December 22, 1982 Order preempting state prescription of depreciation rates are also contained in those appendices.

STATUTES

Relevant United States Code provisions are set out in Appendix A.

STATEMENT OF THE CASE

Regulatory Background

State regulation of the intrastate rates and service of telephone companies precedes the Communications Act.[1]

[1]See *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). As noted in that case, the states were also setting telephone company depreciation rates for intrastate ratemaking purposes.

In 1934, Congress enacted the Communications Act, 47 U.S.C. §§ 151, *et seq.* The broad purpose for creating the FCC was stated in section 151:

> [T]o make available, so far as possible, to all the people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communications service with adequate facilities at reasonable charges.[2]

Section 152 described the scope of the FCC's jurisdiction under the Act.[3] The legislative history of the Act clearly shows that the states were concerned that their traditional regulatory role be maintained, that the FCC not have authority over intrastate rates and service, and that Congress passed the Act with the intent that the FCC's jurisdiction be so constrained.[4] Section 152 divided jurisdiction between the FCC and the states in accordance with the history of telephone regulation. The FCC was authorized to regulate "interstate and foreign Communication." 47 U.S.C. § 152(a). State authority over its historic area of regulation was preserved by 47 U.S.C. § 152(b), which prohibited FCC regulation of "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication." 47 U.S.C. § 220 authorized the FCC to establish a uniform system of accounts and prescribe depreciation rates for interstate carriers.[5] However, FCC accounting and depreciation

[2]Appendix A. at 1a.

[3]Appendix A. at 1a.

[4]See North Carolina Utilities Commission v. FCC, 537 F.2d, 787 (4th Cir. 1976) (*NCUC I), cert. denied,* 429 U.S. 1027 (1976); *North Carolina Utilities Commission v. FCC,* 552 F.2d 1036 (4th Cir. 1976) *(NCUC II), cert. denied,* 434 U.S. 874 (1977).

[5]Appendix A. at 3a.

practices were not to be binding for intrastate ratemaking. Subsections 220(h)-(j) recognized continuing state autonomy to set intrastate rates.

After the passage of the Communications Act, the FCC, pursuant to section 220, established a uniform system of accounts for telephone companies and began prescribing depreciation rates to be used on the companies' books and records. The states continued their historic role of regulating intrastate telephone charges and service and setting depreciation rates to be used for intrastate ratemaking purposes. From the time the Act was passed in 1934, through 1983, the FCC never attempted to prevent any state commission from establishing or using its own accounting or depreciation practices but, instead, expressly recognized state authority to do so. *In the Matter of the Amendment of Part 31,* 89 F.C.C.2d 1094, 1106 (1982).

FCC Proceedings

In its 1980 rewrite of its depreciation rules, the FCC indicated that setting depreciation rates was essential to ratemaking.[6] The *1980 Depreciation Order* was silent as to its effect on intrastate rates. The states' historic independence was apparently maintained. In 1981, the FCC amended its rules governing station connections. *In the Matter of Amendment of Part 31,* 85 F.C.C.2d 818 (1981) (*1981 Station Connection Order*). In that amendment, the

[6]Measures of costs under depreciation accounting, as well as other forms of accounting, are of the utmost importance and should be as accurate as circumstances will allow. The accounting measures of costs and revenues are the information base *upon which pricing and ratemaking decisions are predicated.* (Emphasis supplied.) *In the Matter of Amendment of Part 31,* 83 F.C.C.2d 267, 272 (1980) *(1980) Depreciation Order).*

FCC changed its accounting treatment of the costs of adding customer station connections to the system. The *1981 Station Connection Order* was also silent as to its effect on intrastate accounting and ratemaking.

Petitions for clarification and reconsideration of the *1981 Station Connection Order* were filed by interested states. The states wanted to know if that Order intended to restrict the states' use of alternative accounting and depreciation procedures for intrastate ratemaking. AT&T and GTE opposed the petitions, claiming that the states were restricted.

The FCC determined that the states' ratemaking discretion was not affected by the *1981 Station Connection Order:*

> We have concluded that the *First Report and Order* does not preclude state commissions from using other accounting or depreciation procedures for intrastate ratemaking proceedings.

In the Matter of Amendment of Part 31, 89 F.C.C.2d 1094, 1095 (1982) *(1982 Preemption Order).*

In particular, the FCC concluded that 47 U.S.C. § 220 did not preempt state authority as a matter of law, considering the history of independent state regulation prior to 1934 and the legislative history of the Act. Particularly, the FCC concluded:

> Subsections (h)-(j) indicate that the 1934 Congress wished to achieve as much uniformity as possible without coercing any state commission to use ratemaking methods it found unacceptable. This Commission has proceeded in a manner that is consistent with that purpose for nearly four decades.

Id. at 1106.

* * *

> Thus, AT&T and GTE are asking us to repudiate nearly forty years of administrative practice and applicable state court precedents by adopting an interpretation of section 220 that would require an unwilling state commission to follow all accounting and depreciation methods prescribed by this Commission.

Id. at 1107.

The FCC also concluded that section 220 should be construed in light of subsection 152(b):

> Our analysis of section 220 is supported also by section 2(b) of the Act, 47 U.S.C. § 152(b), which provides in pertinent part that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges . . . for or in connection with intrastate communication service by wire or radio of any carrier. . ." . . . .

Id. at 1108.

Finally, the FCC, citing *NCUC I* and related cases, concluded that additional accounting for intrastate ratemaking purposes would not frustrate federal regulation.

AT&T filed a petition for reconsideration of the *1982 Preemption Order,* asserting that the states should be preempted. GTE of Ohio filed a petition for a declaratory order, asserting that subsection 220(b) required it to use FCC depreciation rates for intrastate ratemaking purposes. After receiving responses and comments, the FCC reversed its *1982 Preemption Order. In the Matter of Amendment of Part 31,* 92 F.C.C.2d 864 (1983) (*1983 Preemption Order*). The FCC repudiated its earlier interpretation of section 220, finding that the intent of Congress was, in fact, to preempt depreciation for intrastate ratemaking purposes. The FCC also determined that if states deviated from its depreciation rates for intrastate ratemaking purposes, intrastate rates might be insufficient. Concerned that insufficient intrastate revenues could hamper its policy of competitive interstate communications, the FCC declared that its depreciation rates were to be applied by all states for ratemaking purposes?

Fourth Circuit Proceedings

The state commissions challenged the FCC's *1983 Preemption Order* before the Fourth Circuit Court of Appeals. The state commissions contended, among other things, that the FCC's preemptive action was not authorized by the Communications Act and was, in fact, prohibited by specific provisions of the Act.

On June 18, 1984, the Court of Appeals upheld the FCC's action. The Court declined to rule on the question of whether subsection 220(b) preempted as a matter of

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[7]To date, six state commissions have been enjoined by federal district courts and required to enter ratemaking order in accordance with the FCC's depreciation rates. *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n,* 570 F.Supp. 227 (M.D. La. 1983), *aff'd.*, 744 F.2d 1107 (5th Cir. 1984); *Chesapeake & Potomac Telephone Co. of Maryland v. Maryland Public Service Comm'n,* 560 F.Supp. 844 (D. Md. 1983), *appeal pending,* No. 83-1403 (4th Cir.); *Northwestern Bell Telephone Co. v. Iowa State Commerce Comm'n,* No. 83-688-A (S.D. Iowa 1984); *Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transportation Comm'n,* 565 F.Supp. 17 (W.D. Wash. 1983), *appeal pending,* No. 83-3746 (9th Cir.); *Southwestern Bell Telephone Co. v. Arkansas Public Service Comm'n,* 738 F.2d 901 (8th Cir. 1984), *cert. pending,* No. 84-483 (U.S.); *Southwestern Bell Telephone Co. v. State Corporation Commission of Kansas,* No. 83-4090 (D. Kan. 1983).

law. The Court ruled, however, that the FCC could preempt any state regulation of intrastate communications that substantially affected valid FCC policy. The Court concluded that the FCC could preempt depreciation for intrastate ratemaking purposes because intrastate rates affect the financial condition of the carriers.

REASONS FOR GRANTING THE WRIT

I.

THE COURT'S DECISION WAS CLEARLY ERRONEOUS, WITH FAR-REACHING, NATIONAL CONSEQUENCES.

A. The FCC's action constituted intrastate ratemaking contrary to 47 U.S.C. § 152(b).

The FCC preempted depreciation for intrastate ratemaking so that intrastate rates would be high enough to ensure the financial condition of interstate communications carriers. It was, purely and simply, an assertion of intrastate ratemaking authority clearly violating the terms of 47 U.S.C. § 152(b).

From the very outset, the FCC treated the preemption of depreciation rates as a ratemaking issue. In its *1982 Preemption Order,* the FCC determined that the states were not precluded "from using other accounting and depreciation procedures for intrastate *ratemaking* proceedings" (at 1095). In interpreting section 220 as not preempting intrastate depreciation, the FCC characterized the matter as ratemaking:

> Subsections (h)-(j) indicate that the 1934 Congress wished to achieve as much uniformity as possible without coercing any state commission

> to use *ratemaking methods* it found unacceptable. . . .

Id. at 1106.

In its *1983 Preemption Order,* the FCC clearly showed that its concern was the amount of revenues received from intrastate rates:

> Depreciation is a significant portion of the revenue requirement of the regulated telephone companies. As such, it plays an important part in determining the price at which they offer their services.

Id. at 877.

The lower court understood that fact:

> To be sure, that prescription does have an effect on intrastate rates. . . .

Virginia State Corporation Commission v. FCC, 737 F.2d at 394.

State commissions have been enjoined by federal district courts and required to enter ratemaking orders in conformance with FCC depreciation rates. In each case, the state commission has been required to change the rates charged for intrastate service, even though it had previously determined those rates to be fair, just and reasonable under state law.

B. The Court's decision has immediate, far-reaching consequences.

The FCC's preemption has had a direct and immediate effect on charges for intrastate communications services. Although only a minority of states declined to adopt the FCC's depreciation policies, the FCC's preemption was

nationwide, precluding any deviation, no matter how insignificant. Six states have already been enjoined and forced to raise intrastate rates by applying the FCC's depreciation methodology. The district courts, when entering injunctions, did not consider whether enforcement was necessary to prevent frustration of the FCC's policy of innovation. The courts took the FCC's *1983 Preemption Order* on its face. The FCC itself never received any evidence on the effect of inconsistent state policy on innovation.

The lower court found that depreciation policies are not "separable from" interstate communications because they would affect the development of the network. *All* intrastate ratemaking principles affect the revenues received by telephone companies. The lower court's logic necessarily leads to the erroneous conclusion that *all* intrastate ratemaking policies are inseparable from interstate communications and may be preempted by the FCC. However, subsection 152(b) clearly does not permit the FCC to preempt intrastate ratemaking.

The new preemption standard is not actually limited to ratemaking. Under the lower court's ruling, preemption is allowed for any indirect effect on FCC policy:

> Since inconsistent state regulation poses an impediment to rapid development of interstate facilities, preemption is justified in this case even if "physical impossibility" is not at issue.

737 F.2d at 396.

This is not a preemption standard. It is a license to regulate intrastate communications. There is no state regulation that could not be preempted under this holding.

Using the touchstone of 47 U.S.C. § 151, the FCC may

now expand its authority as never before. The rule of the case does not recognize any real constraint on FCC preemption. Under the ruling, FCC policy need only be lawful under the Act and inconsistent state policy need only have a *possible* substantial effect. The lower court has placed the FCC on a course that will inevitably consume all important aspects of intrastate regulation. The states will simply execute the policies laid out by the FCC, according to the FCC agenda.

C. The Lower Court validated unprecedented FCC preemption authority contrary to the Act, thus destroying the basic scheme of the Act.

The lower court upheld the FCC's action under the test announced in *Fidelity Union Savings and Loan v. de la Questa,* 458 U.S. 141 (1982). The ultimate question under *de la Questa* was whether the FCC's action was within the scope of the FCC's delegated authority. In upholding the FCC, the Court determined that the FCC could preempt any intrastate regulation that could affect the achievement of valid FCC policy. This holding ignored the plain meaning of 47 U.S.C. §§ 152(b) and 220(h)-(j).

Section 152 clearly speaks to jurisdiction: The FCC has jurisdiction over interstate communications and the states have jurisdiction over intrastate communications. In prescribing depreciation rates the states are regulating only intrastate rates. Subsection 152(a) does not apply at all. The FCC lacks any authority to preempt depreciation for intrastate ratemaking. The lower court's decision expands FCC preemption power well beyond all prior precedent. Now, the subject need not directly involve interstate communications and state regulation need not encroach on FCC authority before the FCC can preempt.

All of the FCC preemption cases preceding the lower court's decision have clearly recognized the significance of

the division of state and federal authority under section 152 of the Act. Each Court acknowledged that Congress explicitly divided state and federal authority. Each Court upheld FCC preemption only after finding that the subject matter fell within the FCC's jurisdiction under subsection 152(a) and that state regulation either precluded or directly encroached on FCC jurisdiction over interstate communications.

In all previous preemption cases where the FCC's action was upheld, even when the subject was severable, one fact always stood out: the states were directly regulating interstate communications charges, facilities or services. *People of the State of California v. FCC,* 567 F.2d 84 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1010 (1978), involved direct state imposition of impractical technical requirements on the use of an interstate line. Likewise, *Capital Cities Cable, Inc. v. Crisp,* 81 L.Ed.2d 580 (1984), involved state regulation of the content of interstate broadcasts.[8]

The Fourth Circuit previously recognized Congress' intent to preserve state autonomy over intrastate ratemaking. In *North Carolina Utilities Commission v. FCC,* 537 F.2d 787 (4th Cir. 1976) (*NCUC I), cert. denied,* 429 U.S. 1027 (1976), the Court concluded that Congress intended to deny to the FCC the kind of authority over intrastate

[8]The lower court conceded that the effect of state depreciation policies on interstate communications was "more attenuated" than other cases. Nevertheless, the court found this tenuous effect sufficient to permit preemption because there would "undoubtedly" be an effect on interstate communications. The effect of inconsistent state depreciation policies on interstate communications is certainly tenuous, considering the fact that the FCC itself never found that they *would* affect interstate communications. The FCC found only that inconsistent intrastate policy *could* affect interstate communications. *1983 Preemption Order,* 92 F.C.C.2d at 877.

rates that the ICC exercised in the *Shreveport* rate case.[9] This conclusion was reiterated in *North Carolina Utilities Commission v. FCC,* 552 F.2d 1036 (4th Cir. 1976) (*NCUC II), cert. denied,* 434 U.S. 874 (1977). The lower court effectively extended the holding in the *Shreveport* rate case to the FCC by concluding that the FCC could preempt intrastate ratemaking policy that indirectly affects the central goals of the Act.

In a recent report adopted by both houses, Congress stated its interpretation of subsection 152(b) and the cases construing it:

> The Committee recognizes that the application of Section 2(b) [47 U.S.C. § 152(b)] is a complex matter with a long history of interpretation by the courts. The Committee does not intend to depart from those interpretations in observing that *Section 2(b) denies the FCC the authority to regulate common carrier communication services that are exclusively local or intrastate in nature.* Section 2(b) does not, however, detract from the FCC's jurisdiction over common carrier communications services that are interstate in character. In particular, it does not bar the FCC from regulating such services which are provided over facilities that also carry intrastate common carrier communications. *Under Section 2(b) the FCC is barred from regulating those local common carrier services which the states may regulate without infringing upon Federal regulatory*

[9]The *Shreveport* rate case was *Houston, E & W Texas Ry. v. United States,* 234 U.S. 342 (1914), wherein this court held that the ICC could exercise authority over intrastate rail rates to prevent discrimination against interstate commerce, the central purpose of the Interstate Commerce Act.

> *authority over rates and terms under which interstate common carrier services are provided.*

H.R. Rep. No. 934, 98th Cong., 2d Sess. 62 (1984).[10]

Congress has confirmed the division of authority under section 152 and made it clear that the FCC may preempt only that state regulation which directly infringes on FCC jurisdiction over interstate communications.

Not only does subsection 152(b) indicate a congressional intent that the FCC not preempt intrastate ratemaking practices, but provisions in section 220 explicitly preclude FCC preemption of depreciation for intrastate ratemaking. In its *1982 Preemption Order,* the FCC identified subsections 220(h)-(j) as preserving state autonomy over depreciation:

> Subsections (h)-(j) indicate that the 1934 Congress wished to achieve as much uniformity as possible without coercing any state commission to use ratemaking methods it found unacceptable. This Commission has proceeded in a manner that is consistent with that purpose for nearly four decades. . . .

89 F.C.C.2d at 1106.

Congress intended that traditional state ratemaking activities not be affected by FCC depreciation jurisdiction.

[10]This is the report of the House Committee on Energy and Commerce on the Cable Franchise Policy and Communications Act of 1984. House Report 98-934 was adopted by the Senate, 130 Cong. Rec. 14,285 (1984), and by the House, 130 Cong. Rec. 12,235 (1984), with minor changes. The only change of consequence to this case is that the Senate and House *reiterated* that Title VI does not affect the division of state and federal authority over non-cable communications under section 152.

Subsection 220(h) specifically allows the FCC to exempt carriers "from any requirements under this section" where such carriers "are subject to state commission regulation with respect to matters" covered by this section. Subsection 220(h) assumes that the states may regulate depreciation for intrastate purposes. If Congress had intended subsection 220(b) to preempt all state depreciation regulation as a matter of law, subsection 220(h) would be meaningless. Congress would not have included meaningless language in an Act.

Subsection 220(j) provides that the FCC is to report to Congress on the need for legislation to further harmonize state and FCC powers over accounting and depreciation. If Congress had intended to preempt all depreciation as a matter of law, subsection 220(j) would have little purpose. Very simply, Congress reserved to itself, not the FCC, the authority to change the provisions of the Communications Act in the event that preemption of state regulation was required.

In its *1983 Preemption Order,* the FCC reversed its earlier interpretation of section 220. For nearly fifty years the FCC had understood clearly the congressional directive of section 220. The FCC correctly applied its terms in its *1982 Preemption Order*. Upon the urging of the telephone companies the FCC repudiated the interpretation it had long applied. The lower court completely ignored the FCC's long practice and approved preemption even though section 220 did not permit it.

The FCC's *1983 Preemption Order* is a classic case of administrative legislation and the lower court's decision is a classic case of judicial legislation. In 1934, Congress chose to adopt a regulatory scheme dividing interstate from intrastate authority. That division has been con-

sistently recognized by the FCC and the courts since that time. In 1976 and 1977, the Fourth Circuit stated that the FCC was not to exercise intrastate ratemaking jurisdiction. Congress has recently confirmed that division. Now, on the 50th anniversary of the Act, the lower court has concluded that the original regulatory scheme is outmoded and does not reflect current regulatory goals. Its solution is to substitute its wisdom for that of Congress.

This Court's decision in *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission,* 75 L.Ed.2d 752 (1983), is particularly instructive. In that case, the Court determined that the Nuclear Regulatory Commission (NRC) could not preempt state regulation of the economic justification for building a nuclear power plant. The Court noted that the state regulation could hamper the development of the nuclear power industry, a central goal of the Atomic Energy Act. The Court held, however, that preemption was not permitted because the Act preserved traditional state regulation of the economic feasibility of power plant construction and that the NRC had not been granted authority to regulate in that area. The Communications Act likewise preserved traditional state authority over intrastate communications rates and service and expressly denied that authority to the FCC.

> Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The Courts should not assume the role which our system assigns to Congress.

Pacific Gas and Electric, 75 L.Ed.2d at 777.

If the lower court's decision is left to stand, it is the end of local regulation of intrastate communications. Subsections 152(b), 220(h)-(j) and 221(b) have been subordinated to the FCC's regulatory agenda. The Act will no longer recognize the historic role of the states in regulating intrastate communications rates and service. Congress' original scheme of dual regulation has given way to the lower court's "overriding concern" for a "rapid, efficient, nationwide, and worldwide communication service."

II.

THE LOWER COURT'S NEW TEST FOR FCC PREEMPTION DIRECTLY CONFLICTS WITH PREVIOUS INTERPRETATIONS OF THE COMMUNICATIONS ACT.

The standard for FCC preemption established by the United States Courts and acknowledged by Congress is clear: the FCC may only preempt intrastate regulation that directly infringes on FCC jurisdiction over interstate communications. The FCC is not allowed to preempt simply because intrastate regulation may affect FCC interstate policy.

A. Conflict with a decision by this Court.

This Court has determined that the FCC's broad powers to promote the general goals of the Act are properly limited by explicit provisions of the Communications Act. *Federal Communications Commission v. Midwest Video Corp.,* 440 U.S. 689 (1979). In that case, this Court determined that the scope of the FCC's "ancillary" jurisdiction was limited by 47 U.S.C. § 153(h):

> In determining, then, whether the Commission's assertion of jurisdiction is "reasonably ancillary

> to the effective performance of [its] various responsibilities for the regulation of television broadcasting," *United States v. Southwestern Cable Co.*, 392 U.S., at 178, 20 L.Ed.2d 1001, 88 S.Ct. 1994, we are unable to ignore Congress' stern disapproval – evidenced in § 3(h) [47 U.S.C. § 153(h)] – of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike. Though the lack of congressional guidance has in the past led us to defer – albeit cautiously – to the Commission's judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to be sharply delimited.

FCC v. Midwest, 440 U.S. at 708.

The lower court's affirmance of the FCC's depreciation preemption ignored this Court's construction of the Communications Act. The lower court's decision was based on a conclusion that the FCC's general objectives in section 151 overrode the express Congressional restriction of FCC jurisdiction contained in subsection 152(b).

B. Conflict with another Circuit.

The Court of Appeals for the District of Columbia Circuit has recognized that subsection 152(b) constrains the FCC's broad authority. In *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976), the Court held that the FCC could not preempt intrastate non-video communications over cable systems that provided interstate video communications, finding in part, that subsection 152(b) barred such authority. According to the Court, the FCC had proposed to regulate this intrastate traffic because it was "essential, if the goal of a nationwide broad-band communications

grid is to be achieved. 49 F.C.C.2d at 1083." In response, the Court stated:

> We are not convinced that this goal of nationwide communications network must, in all cases, take precedence, especially where the Commission jurisdiction is explicitly denied under other provisions of the Act . . . .

NARUC v. FCC, 533 F.2d at 613.

The Court found the preemption in question prohibited by subsection 152(b), even though the general purpose of the Act was being served. The lower court's view of subsection 152(b) is directly at odds with *NARUC v. FCC*.

C. Conflict with the cited authority.

The lower court relied on a series of cases arising from *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976) (*NCUC I*), *cert. denied*, 429 U.S. 1027 (1976). However, the lower court's construction of subsection 152(b) is at odds with the cited cases. Each case quoted the following language from *NCUC I:*

> [T]he provisions of Section 2(b) [47 U.S.C. § 152(b)] deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that Section 2(b) sanctions any state regulation formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under Sections 201 through 205.

(537 F.2d at 793)[11]

This language clearly contemplates that state regulation must encroach on FCC jurisdiction over interstate communications before the FCC may preempt.

All of the preemption cases relied upon by the lower court have clearly recognized the significance of the division of state and federal authority under section 152. Each court acknowledged that Congress explicitly divided state and federal authority. Each court upheld FCC preemption only after finding that the subject matter fell within the FCC's explicit jurisdiction, interstate communications, and that state regulation either ousted or directly encroached on FCC interstate jurisdiction.

In *NCUC I* and *North Carolina Utilities Commission v. FCC,* 552 F.2d 1036 (4th Cir. 1976) *(NCUC II), cert. denied,* 434 U.S. 874 (1977), the Fourth Circuit determined that intrastate ratemaking was separable from and had no substantial effect on FCC jurisdiction. In setting depreciation rates, the states are regulating only intrastate rates. This intrastate regulation does not infringe on FCC authority. It does not directly burden the interstate network with impractical technical requirements.[12] It does

[11]See *Computer and Communications Industry v. FCC,* 693 F.2d 198, 215 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983); *New York Telephone Company v. FCC,* 631 F.2d 1059, 1066 (2d Cir. 1980); *Puerto Rico Telephone Company v. FCC,* 553 F.2d 694, 699 (1st Cir. 1977); *People of State of California v. FCC,* 567 F.2d 84, 87 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1010 (1978).

[12]*People of State of California v. FCC,* 567 F.2d 84 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1010 (1978).

not impose service requirements on interstate facilities.[13] It does not set charges for interstate communications.[14] Intrastate prescription of depreciation rates is used only to set charges for intrastate communications service.

The meaning given to subsection 152(b) by the Courts of Appeal throughout the United States is clear: the FCC may preempt only that state regulation that *directly* infringes on FCC jurisdiction over interstate communications. There is no justification for the lower court's decision to uphold the FCC's illegal act of preempting intrastate ratemaking. The effect of intrastate rates on the financial condition of a carrier is a matter outside of the FCC's jurisdiction.[15]

The lower court's new approach to preemption allows the FCC to preempt any intrastate regulation that may *indirectly* affect its interstate policies. The subject need not include interstate communications and state regulation need not encroach upon FCC jurisdiction. The lower Court has substantially departed from a consistent line of authority adopted among several circuits.

CONCLUSION

The Federal Communications Commission has acted beyond the bounds of its authority under the Communica-

[13]*Computer and Communications Industry Association v. FCC,* 693 F.2d 198, 215 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983).

[14]*New York Telephone Company v. FCC,* 631 F.2d 1059, 1066 (2d Cir. 1980).

[15]Any claim that the FCC's preemptive action was not ratemaking ignores the clear intent of subsection 152(b). That which cannot be done by express statutory prohibition cannot be done by indirection. *Anderson v. Martin,* 375 U.S. 399, 404 (1964).

tions Act. It has acted to preempt intrastate authority in direct violation of several provisions of the Communications Act. The lower court has validated the FCC's illegal action by finding preemption authority heretofor unknown. This new preemption authority is contrary to the express provisions of the Communications Act, the cases construing it, and a statement of interpretation by Congress. The lower court has improperly substituted its wisdom for that of Congress and has departed radically from a consistent and logical line of authority. The effect of the lower court's action is immediate and nationwide. The Petitioner respectfully requests that this Court protect the integrity of the Communications Act and issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

STATUTES

47 U.S.C. § 151

Purposes; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

47 U.S.C. § 152

Application

(a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio sta-

tions as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in [the Philippine Islands or] the Canal Zone, or to wire or radio communication or transmission wholly within [the Philippine Islands or] the Canal Zone.

(b) Except as provided in section 224 [47 USCS § 224] and subject to the provisions of section 301 [47 USCS § 301], nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive [47 USCS §§ 201-205], shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

47 U.S.C. § 220
Accounts, records, and memoranda

(a) Forms. The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

(b) Depreciation charges. The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the clasess [classes] of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(c) Access to information; burden of proof. The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and

memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. Any provision of law prohibiting the disclosure of the contents of messages or communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this section.

(d) Penalty for failure to comply. In case of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or submit such accounts, records, memoranda, documents, papers, and correspondence as are kept to the inspection of the Commission or any of its authorized agents, such carrier shall forfeit to the United States the sum of $500 for each day of the continuance of each such offense.

(e) False entry; destruction; penalty. Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, shall be deemed guilty of a misdemeanor, and shall be subject,

upon conviction, to a fine of not less than $1,000 nor more than $5,000 or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment: Provided, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed and prescribing the length of time such books, papers, or documents shall be preserved.

(f) Confidentiality of information. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(g) Use of other forms; alterations in prescribed forms. After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect.

(h) Exemption; regulation by State commission. The Commission may classify carriers subject to this Act and prescribe different requirements under this section for different classes of carriers, and may, if it deems such ac-

tion consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

(i) Consultation with State commissions. The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(j) Report to Congress on need for further legislation. The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.